Sanderson Farms, Inc. (Production Division) *and* United Food and Commercial Workers Union, Local 1529. Case 15–CA–16450

September 29, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

The central issue in this case is whether the administrative law judge correctly found that the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act[1] when it discharged employee Bill Noland.[2]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions[4] and to adopt the recommended Order as modified and set forth in full below.[5]

We agree with the judge's finding that the Respondent violated Section 8(a)(3) and (1) when it discharged Noland on November 6, 2001.[6] Under *Wright Line*,[7] the General Counsel has the burden of showing that Noland's union activity was a motivating factor in the Respondent's decision to discharge Noland. The burden then shifts to the Respondent to establish that it would have discharged Noland even in the absence of his union activity.

We agree with the judge's finding that the General Counsel met his burden under *Wright Line*. Thus, as the judge found, the Respondent knew of Noland's union activity prior to his discharge and had reason to believe that Noland was a chief proponent of the Union. The Respondent demonstrated animus against the Union when it unlawfully interrogated and threatened Keith Wicker. Moreover, the Respondent's threat to Wicker demonstrates its animus against Noland in particular. The Respondent's admonition to Wicker to stay away from Noland if Wicker did not want to get involved in the Union, shows that Noland's union activity was a factor in the Respondent's decision to discharge him. Additionally, the Respondent displayed its unlawful motivation toward Noland when it unlawfully told Scott Boyd that it planned to weed out troublemakers.

We also agree with the judge's finding that the Respondent did not meet its *Wright Line* burden of proving that it would have discharged Noland even if he had not been engaged in union activity. As set out more fully in the judge's decision, the Respondent asserts that it discharged Noland for incurring a fifth unexcused absence under the Respondent's attendance rules when he left work early on October 29. However, Noland's credited testimony shows that the Respondent's dispatcher, Fred Jones, told Noland on October 29 that the only truck that was available while Noland's truck was being serviced "would not pull" and that Noland could go home. Thus, there was no available truck on October 29, and Noland should not have been assessed an unexcused absence for October 29 under the Respondent's attendance rules. Noland, accordingly, did not have the five unexcused absences required for discharge. On these grounds, we find that the Respondent's purported reason for its action, a fifth unexcused absence, did not exist. Moreover, the Respondent's failure to investigate the condition of Noland's truck on October 29 before it decided to discharge him suggests that the Respondent was not concerned whether it had legitimate, nondiscriminatory grounds to discharge Noland. The Respondent's reason for discharging Noland was, therefore, pretextual and defeats its attempt to show that it would have discharged Noland absent his union activities.[8] *Grand River Village*,

[1] Other issues presented are whether the judge correctly found that the Respondent violated Sec. 8(a)(1) of the Act: (1) when the Respondent's, personnel supervisor, Derek Fletcher asked Keith Wicker, as he was applying to return to work for the Respondent, if he was for or against the Union and when Fletcher impliedly threatened Wicker with negative consequences if he associated with Noland, a known union supporter; and (2) when its Division Manager Ed Putnam told employee Scott Boyd that the Respondent was experiencing problems over the Union and was trying to weed out the troublemakers.

[2] On November 20, 2002, Administrative Law Judge Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] The judge inadvertently found that the Respondent unlawfully refused to reinstate Noland and included a remedy for this finding in his recommended Order. We shall modify the recommended Order to delete any reference to such refusal to reinstate, which was neither alleged nor litigated.

[5] We shall modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), *Excel Container, Inc.*, 325 NLRB 17 (1997), and *Ferguson Electric Co.*, 335 NLRB 142 (2001). We shall also add an expunction provision under *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

[6] All dates refer to 2001 unless otherwise indicated.

[7] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[8] The judge counted July 2 as an unexcused absence for Noland, which would have been a fifth unexcused absence. However, July 2 was the date that Noland received a formal warning. The judge also

326 NLRB 1215, 1219 (1998); *Limestone Apparel Corp.*, 255 NLRB 722 (1981) enfd. 705 F.2d 799 (6th Cir. 1982).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Sanderson Farms, Inc. (Production Division), Fernwood, Mississippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating its employees about their activity on behalf of the United Food and Commercial Workers Union, Local 1529, or any other labor organization.

(b) Impliedly threatening its employees with negative consequences if they become involved with the Union.

(c) Threatening its employees that it is experiencing problems and will weed out troublemakers who support the Union.

(d) Discharging its employees because of their involvement with the Union.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Bill Noland full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Bill Noland whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any references to Noland's unlawful discharge, and within 3 days thereafter notify him in writing that this has been done and that the unlawful discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Fernwood, Mississippi, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 10, 2001.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 29, 2003

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Robert J. Battista, Chairman

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Peter C. Schaumber, Member

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Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An agency of the United States Government

erroneously found that Putnam was present in Fletcher's office when Noland was told that he was being terminated. Neither of these factual errors affects our decision.

In light of our conclusion that the Respondent failed to establish its *Wright Line* defense that it discharged Noland for unexcused absences, we find it unnecessary to rely on the judge's discussion of disparate treatment.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate our employees about their activity on behalf of the United Food and Commercial Workers Union, Local 1529, or any other labor organization.

WE WILL NOT impliedly threaten our employees with negative consequences if they become involved with the Union.

WE WILL NOT threaten our employees that we are experiencing problems and will weed out troublemakers who support the Union.

WE WILL NOT discharge our employees because of their involvement with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the Board's Order, offer Bill Noland immediate reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Bill Noland whole for any loss of earnings and other benefits resulting from our discrimination against him, less any net interim earnings, plus interest.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful discharge of Bill Noland, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the unlawful discharge will not be used against him in any way.

SANDERSON FARMS, INC. (PRODUCTION DIVISION)

Kevin McClue, Esq., for the General Counsel.
Andrew C. Partee Jr., Esq., of New Orleans, Louisiana, for the Respondent.
Roger K. Doolittle, Esq., of Jackson, Mississippi, for the Charging Party.

DECISION

This case was heard in Magnolia, Mississippi, on September 16 and 17, 2002. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by Respondent and General Counsel, I make the following findings

I. JURISDICTION

Respondent admitted that it is a corporation, with an office and place of business at Fernwood, Mississippi. Respondent admitted that in the conduct of its business it annually sells and receives goods valued in excess of $50,000 directly from points outside Mississippi, and has been an employer at material times engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admitted that the Charging Party (Union) has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The complaint includes allegations of unlawful interrogation, threats, and discharge.

The Record

Bill Noland worked for Respondent as a truck driver for about 7 years.[1] Noland and another employee were the employees that first contacted the Union in July 2001. Employees then met with Union Representative Bill Johnson at Brian White's house. The employees decided to try and organize for the Union. Johnson gave them authorization cards to distribute among the employees. Noland passed out approximately 10 to 15 cards to employees in the parking lot of the feed mill over the 3 or 4 days after the meeting.

Noland took a vacation during the week of September 10, 2001. After working on Friday, September 7, he flew to Salt Lake City. The Union was elected representative of unit employees while Noland was away. Upon his return on September 17, Noland was given a writeup for not working on Saturday, September 8. The warning was marked "final warning," and included the notation "Vacation Starts Monday."[2] Noland testified that employees do not work on Saturdays unless assigned.[3] Bill Noland met with Personnel Supervisor Derek Fletcher and asked to see the rule that required employees to work while on vacation. Fletcher told him there was no such rule. Noland then asked how anyone could plan a trip 2 months ahead and not know he would have to work on Saturday. He asked Fletcher, "can you get it through your thick skull about that?" Fletcher got up, walked around his desk and said, "Bill, you can ask some of the stupidest questions." Then Fletcher said, "Bill, you need to get with your union representative." Noland replied, "you are looking at one of the stewards now."

Derek Fletcher interviewed Keith Wicker around October 17, 2001. Wicker was applying to return to work for Respon-

[1] Noland was discharged on November 6, 2001.

[2] His vacation did not officially start until Monday, September 10, and Noland was assigned to work on Saturday, September 8.

[3] Noland testified that the normal procedure was for Respondent to post Saturday assignments on Thursday or Friday. Noland did not testify that notice of his September 8 assignment was not posted on September 6 or 7, and there was no other evidence showing that Respondent did not give proper notice of the September 8 assignments.

dent. Wicker testified that Fletcher asked him if he knew a union had come in and if he was for or against the Union. Fletcher told him to stay away from Bill Noland if he did not want to get involved in the Union.

Scott Boyd[4] phoned Respondent around October 19, 2001, and talked to Lee Gill about returning to work for Respondent. At that time Boyd had four outstanding traffic tickets and 13 over a period of time on his CDL. He understood that Respondent had a rule prohibiting rehire for anyone with more than three traffic tickets. Boyd asked Gill if the traffic tickets meant that he would not get a job. Gill replied that the Company was having trouble with the Union and turmoil was going on. Boyd cut Gill off and said that he wasn't interested, that he wasn't part of that and that he just wanted a job. Gill told him to report Monday morning.

Boyd was called into the office and met with Ed Putnam and Derek Fletcher in October or November 2001. Before that meeting he had been complaining to Lee Gill about split loads. Boyd was asked to explain his problem. He complained that the assignment system was unfair. Putnam said there were problems they were having because of the union stuff and they had a few troublemakers. Putnam said they were trying to work around it. He told Boyd that they were trying to weed out the troublemakers. Boyd said that he did not have anything to do with that but that he was having problems with some of the employees. Boyd told Putnam and Fletcher that somebody was threatening to shoot him if he did not strike. Fletcher asked Boyd to give him the "CB handles"[5] for the truck drivers. Boyd gave Fletcher all the handles that he knew.

On October 29, 2001, Bill Noland was told that his truck needed service. He asked to be assigned another truck. Noland testified that the dispatcher, Fred Jones, replied that truck 4155 was out there but "it wouldn't pull." Noland then took his truck to the shop. He stopped at truck 4155 but then decided not to try and drive it in view of Jones's comments. Noland went back to Fred Jones and said that since Jones had said that 4155 would not pull, he would go to the house. According to Noland, Jones gave him permission to go home.[6] Noland punched out around 11:30.

Noland's time card was missing when he reported to work on November 6. He was directed to Derek Fletcher. Fletcher, Lee Gill,[7] and Ed Putnam[8] were all present in Fletcher's office. Fletcher read out the list of Noland's absences and said that Noland had left early on October 29. Noland told them that Fred Jones had told him that truck 4155 would not pull. Noland asked if he was fired. Gill said no that he wanted Noland to haul feed. Ed Putnam said that he wanted to check out truck 4155 and he would let Noland know at the end of the day.

At the end of the day Noland was directed back to Fletcher's office. Putnam, Gill, and Fletcher were all present. Fletcher read off Noland's unexcused absences and asked for Noland's badge. Noland asked how come the driver that left early on the last day he worked was not written up. Lee Gill replied that that driver should have been written up. Noland asked for his termination paper and Fletcher replied he had been advised not to give a copy to Noland.

Findings

Credibility

I base my credibility findings on the full record including demeanor of the witnesses and other evidence including especially whether the testimony was rebutted or supported by other testimony. In determining credibility the testimony of Scott Boyd was significant in regard to his credibility and that of other witnesses. Boyd was employed as a truckdriver at the time of material events and at the time he gave an affidavit to the NLRB Regional office. However, when he testified Boyd had been promoted to supervisor.

I found Boyd to be a reluctant witness. Among other things his testimony at the hearing conflicted with his sworn affidavit. Additionally, it was apparent from his demeanor that he was uncomfortable throughout his examination by counsel for General Counsel. Nevertheless, Boyd admitted among other things, that Ed Putnam told him that the Company was having trouble over the Union and Putnam was going to weed out the troublemakers. That testimony was in accord with testimony Boyd gave in a prehearing affidavit. At that time Putnam and Derek Fletcher were talking with Boyd in Fletcher's office and the three of them discussed, among other things, Boyd's allegation that other employees were harassing him regarding the Union. In view of the consistency between his affidavit and that testimony, his demeanor and the full record, I credit Boyd's testimony about Putnam weeding out the troublemakers.

Scott Boyd also testified in a prehearing affidavit that he overheard Fred Jones say, "He had said he would get rid of that son of a bitch." Jones made that comment on the day Bill Noland was discharged and Jones was referring to Noland. Boyd disputed that testimony at the hearing. He testified that he had not actually overheard Jones make those statements. Instead he testified that his affidavit was incorrect and that he had actually only overheard Keith Wicker say that he, Wicker, had heard Jones make that comment. Keith Wicker was not questioned about November 6, and when asked about that date on cross-examination, counsel for General Counsel successfully objected that that question was outside the scope of direct examination. In view of the entire record, and in view of the fact that no testimony during the hearing supported a finding that Fred Jones made comments regarding getting rid of Noland, I am unable to credit evidence that Fred Jones said that he was going to get rid of Bill Noland.

I considered the demeanor of Derek Fletcher and that of Keith Wicker. Wicker testified that Derek Fletcher interviewed him and that Fletcher asked him if he supported or opposed the

[4] Scott Boyd is now a supervisor. At material times he was a truckdriver.

[5] Boyd testified that he overheard someone threatening to shoot him over the CB radio. He testified that anyone listening to the CB conversations could identify the speakers if they knew each speakers "handle" (CB call name).

[6] Fred Jones testified that he told Noland that the shop had cleared truck 4155. He denied telling Noland that the truck would not pull and he denied that he gave Noland permission to go home.

[7] Gill was the mill supervisor.

[8] Putnam was Respondent's manager.

Union. Fletcher told Wicker to stay away from Bill Noland if he did not want to get involved with the Union. Fletcher testified that it was Wicker and not himself, that first brought up the Union and Fletcher denied that he told Wicker to stay away from Bill Noland. I am convinced that Wicker was the more credible of the two witnesses and I credit his testimony and do not credit Fletcher to the extent Fletcher's testimony was disputed by credited evidence.

There was testimony regarding Bill Noland's terminal interviews. It is evident from all the evidence, that there were two interviews regarding Noland's discharge and both occurred on November 6, 2001. The same four people were present at both interviews. Those four were Noland, Ed Putnam, Derek Fletcher, and Lee Gill. I found that Bill Noland was a credible witness and other than noted below, I have fully credited his testimony.

A determination of what occurred during the first interview is of significant importance in determining why Respondent discharged Bill Noland. However, three of the witnesses to that meeting, Noland, Putnam, and Gill failed to gave a complete account of the first November 6 meeting. Derek Fletcher's testimony involved the most complete recollection of that meeting but, as shown above, in other respects Fletcher was not totally credible. Therefore, I also considered credible evidence regarding the key event that was discussed in the morning meeting. That key event was the exchange between Bill Noland and Fred Jones on October 29. In regard to what actually happened on October 29, I credit the testimony of Noland, which showed, among other things, that Jones told him truck 4155 would not pull and that Jones gave Noland permission to go home.

Fletcher's testimony of the first meeting on November 6, as to what was said by Bill Noland, tracks what Noland testified regarding his encounter with Fred Jones.

Nevertheless, I also considered other evidence including what Fletcher testified regarding his role in the investigation following the first November 6 meeting. Derek Fletcher testified that he talked with dispatcher Fred Jones. Among other things Jones told Fletcher that he told Noland on October 29, the shop had cleared truck 4155, that he did not tell Noland that truck 4155 would not pull and that he told Noland he could drive 4155 or go home. That evidence supported Derek Fletcher's account of the first November 6 meeting even though Jones denied telling Noland that truck 4155 would not pull.

Moreover, there was no testimony showing that Fletcher's account of that meeting was incorrect. Although Noland, Putnam, and Gill were at the meeting, none of them testified in as much detail as Fletcher. Nevertheless, Noland, Putnam, and Gill did not dispute Fletcher's account of that meeting. Therefore, I credit Fletcher's account of that first meeting.

In regard to the second meeting on November 6, I find the evidence was not in conflict as to material issues. There was no dispute but that Noland was discharged during that meeting.

Conclusions

The 8(a)(1) Allegations

Interrogation on October 10, 2001

Threat of Negative Consequences

The evidence regarding these allegations is found in the testimony of Keith Wicker. As shown above Wicker testified about a conversation he had with Personnel Supervisor Fletcher around October 17, 2001. Wicker was being interviewed before returning to work for Respondent. I have credited testimony that Fletcher asked Wicker if he knew a union had come in and if he was for or against the Union. Fletcher told him to stay away from Bill Noland if he did not want to get involved in the Union.

The test frequently applied in allegations of illegal interrogation is the one that was applied in *Bourne v. NLRB*, 332 F.2d 47 (see *Dorn's Transportation Co.*, 168 NLRB 457 (1967). The criteria applied there included, (1) the background; (2) the nature of the information sought; (3) the identity of the questioner; (4) the place and method of interrogation; and (5) the truthfulness of the reply. Here, as to (1), there was no showing that Respondent had a history of hostility and discrimination. Regarding (2), the information sought could have led Respondent to reject the job application of Wicker or it could have coerced Wicker into avoiding the Union. As to (3), the questioner was a high-ranking supervisor. Regarding (4), the interrogation occurred in the office where employees were interviewed for employment. As to (5), the record does not show whether Wicker's reply was truthful or not.

The Board has determined that an examination of the above criteria need not involve a strict evaluation of each factor. Instead, the "flexibility and deliberately broad focus of this test make clear that the *Bourne* criteria are not prerequisites to a finding of coercive questioning, but rather useful indicia that serve as a starting point for assessing the 'totality of the circumstances." *Westwood Health Care Center*, 330 NLRB 935 (2000); citing "D" *Perdue Farms Inc. v. NLRB*, 144 F.3d 830 (D.C. Cir. 1998); *Timsco, Inc. v. NLRB*, 819 F.2d 1173 (D.C. Cir. 1987).

In addition to the above-noted factors, Fletcher's comment that Wicker should stay away from Noland adds to the showing of coercive interrogation and includes an implied threat of negative consequence. In view of the above, I am convinced that the interrogative and implied threat were coercive and constituted violations of Section 8(a)(1).

Threat to Weed-Out Troublemakers

Scott Boyd[9] was called into the office and met with Putnam and Fletcher in October or November. Before that meeting Boyd had complained to Lee Gill about split loads. Boyd was asked to explain his problem. He complained about an unfairness of the assignment system. Putnam said there were problems they were having because of the union stuff and they had a few troublemakers. They were trying to work around it.

[9] Scott Boyd is currently a supervisor. He was called by counsel for General Counsel and examined under Rule 611(c) FRE.

Putnam told Boyd that they were trying to weed out the troublemakers. Boyd said that he did not have anything to do with that. Boyd then said that he was having problems with some of the employees. Somebody was threatening over the CB radio to shoot Boyd if he did not strike. Fletcher asked Boyd to give him the "CB handles"[10] for the truckdrivers. Boyd gave Fletcher all the handles that he knew.

It is clear from the above, that Putnam in threatening to weed out troublemakers was threatening to discharge employees that were supporting the Union. Those comments constitute threats in violation of Section 8(a)(1).

The 8(a)(3) Allegations

Bill Noland was involved in union activities. He and another employee were the employees that first contacted the Union in July 2001. Employees then met with Union Representative Bill Johnson at Brian White's house. Bill Noland passed out 10 to 15 cards to employees in the parking lot of the feed mill over 3 or 4 days after that meeting. The evidence showed that Respondent learned that Noland was involved with the Union shortly after September 17, 2001. Noland testified that he told Derek Fletcher that he was a Union steward when they met and Noland complained about receiving his September 17 final warning. Fletcher then told Lee Gill that Noland was a steward. Ed Putnam admitted that he received an unfair labor practice charge against the Company around October 12 alleging that it had unlawfully discriminated against Noland because of his union activity. Derek Fletcher cautioned Keith Wicker on October 17 to stay away from Noland if he wanted to stay out of the Union.

I have also considered whether Respondent demonstrated union animus. The evidence regarding animus rests on the testimony of Keith Wicker and Scott Boyd. As shown above Wicker was interrogated about how he felt about the Union when rehired by Respondent on October 17, 2001. Derek Fletcher told Wicker to stay away from Bill Noland if he did not want to get in the Union. Scott Boyd testified that Ed Putnam said the Company was troubled by the Union and that he was going to get rid of the troublemakers.

That testimony by Wicker and Boyd shows that the Company was opposed to the Union and that Ed Putnam[11] intended to get rid of the troublemakers. Putnam did not identify the troublemakers in his comments to Boyd, but Derek Fletcher illustrated to Keith Wicker on October 17, that Bill Noland was the employee most closely identified with the Union. I find that Respondent demonstrated union animus.

One other factor appeared to have some importance. That involved the timing of Noland's discharge. Noland's final warning (GC Exh. 2(D)) included a notation of the unexcused absences that justified that warning. The first of those unexcused absences occurred on May 5, 2001. Under Respondent's continuing 6-month rule that particular unexcused absence expired[12] on November 5, 2001. Therefore, when Respondent met to consider discipline to Noland on November 6, the 6-month period had just expired on the first unexcused absence used to justify Noland's final warning. The absentee system testified to by Derek Fletcher, involved progressive discipline that involved a formal warning after three unexcused absences, followed by a final warning if the employee had another unexcused absence within the continuing 6 months which would be followed by discharge if that employee had an additional unexcused absence within the same 6 months. When Putnam, Fletcher, and Gill considered action against Noland on November 6, the 6-month clock was just past its limit. However, the last incident that had allegedly caused Putnam, Fletcher, and Gill to meet on November 6, did occur on October 29, which was just before the end of that continuing 6 months. Therefore, Respondent was under a deadline of sorts, regarding use of all the unexcused absences it had relied on in issuing Noland a final warning. It was apparent that any chance to discharge Noland for absenteeism may pass or at the very least be delayed, if Respondent failed to act on November 6.

Another matter that should be considered at this point is Noland's final warning. The final warning was not alleged as an unfair labor practice but there appeared to be some question of whether the warning was issued because of Respondent's union animus. However, the evidence did not establish that Respondent was aware of Noland's union activities on September 17. Additionally, the evidence failed to show Respondent treated Noland in a discriminatory manner on that occasion.

The September 17 warning arose over an incident on Saturday, September 8, 2001. That weekend preceded Noland's vacation, which started on September 10, and lasted until he returned to work on September 17. Saturdays were not regular workdays but employees were routinely assigned Saturday work on an irregular basis and, when assigned, Saturday was treated as any other workday. Noland testified that Saturday work was normally assigned on Thursday or Friday before the assigned Saturday workday and there was no evidence showing that practice was not followed on the week ending September 8. There was no evidence illustrating that Noland was unaware of his September 8 work assignment before he left for vacation in Salt Lake City. In view of that evidence, I find that Noland missed assigned work on September 8. Moreover, the record failed to show that Noland gave prior notice to Respondent that he was going to miss that work. I find that Respondent did nothing wrong when it issued a final warning to Noland on September 17, 2001.

It is well established that the General Counsel has the burden of proving that Respondent was motivated to discharge an alleged discriminatee because of union animus (*Manno Electric*, 321 NLRB 1 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*,

[10] Boyd testified that anyone listening to the CB conversations could identify the speakers if they knew each speakers "handle" (CB call name).

[11] Putnam denied that he has had a conversation with Scott Boyd regarding the Union and he denied that he told Boyd that he was going to weed out union troublemakers. As shown above, I credit Boyd and discredit Putnam regarding their conversation.

[12] Although there is no evidence that unexcused absences were removed from employees' records after 6 months, it was Respondent's practice to consider only unexcused absences that occurred in the 6-month period immediately before contemplated disciplinary action.

462 U.S. 393 (1983)). The evidence shows that Respondent knew before his discharge that Noland was involved with the Union and Respondent had reason to believe that Noland was perhaps the chief proponent of the Union. The evidence proved that Respondent harbored animus against the Union and that it was motivated by its union animus to discharge Noland.

As shown in the above-cited cases, I must consider whether Respondent proved that it would have discharged Noland in the absence of its union animus.

As shown herein, Derek Fletcher testified about the first of two, November 6 meetings between Fletcher, Ed Putnam, Lee Gill, and Bill Noland. Fletcher went over Noland's unexcused absences but Noland said that Fred Jones[13] told him he could go home on the day of his last absence. Fred Jones told Noland that the truck they wanted him to drive wouldn't pull.[14] At that point the interview was delayed. The interview was delayed according to Fletcher and Ed Putnam in order for Respondent to investigate the claims made by Noland. Fletcher participated in the investigation by talking with the dispatcher, Fred Jones. Gill participated in the investigation by riding along while a driver took truck 4155 out on a run.

Although both Ed Putnam and Derek Fletcher testified that attendance was the sole basis for Bill Noland's discharge, it was not a question of absence that allegedly caused Ed Putnam to finally decide on discharge after the November 6 investigations. Instead, Lee Gill finding that truck 4155 was operational on November 6 allegedly prompted the discharge.

I have several problems with the allegation that the November 6 test of truck 4155 was the deciding factor in the discharge of Noland. In the first place Respondent never contended that Noland was fired because he refused to drive truck 4155. Instead he was discharged allegedly because he left work before his shift ended. As to truck 4155 the only relevant question appeared to be whether Fred Jones told Noland that that truck would not pull. Noland did not drive truck 4155 on October 29. Instead after Fred Jones allegedly told him that truck would not pull, Noland decided against driving the truck, returned to the shop and told Fred Jones that he had decided not to drive 4155.

Moreover, if the condition truck 4155 had been a material consideration, then the condition of the truck around October 29, should have been the focal point and, as to that matter, it was not necessary to test drive the truck on November 6. Instead Respondent had numerous records including the daily logs on truck 4155 that would have shown how truck 4155 performed at material times.[15] Those records were not examined according to the testimony of Putnam, Fletcher, and Gill regarding the November 6 investigation.

In view of the above, I find that the contention that Respondent relied on a November 6 determination that truck 4155 was operational, was pretext. In truth Respondent used that argument to justify its discharge of Noland even though the only true question that may have been relevant under Respondent's alleged basis for its action, was whether Noland should receive an unexcused absence for leaving work early on October 29.

As shown above, despite the alleged impact of Gill's findings regarding truck 4155, both Putnam and Fletcher's testified that the sole basis for Noland's discharge was his absentee record, I shall consider that matter. As explained by Fletcher in his testimony, Respondent's absentee rule provided that employees were subject to discharge for five unexcused absences during any 6-month period. Employees received a warning after three and a final warning after four, unexcused absences.

Noland's attendance log (R. Exh. 11) shows unexcused absences on May 5, June 28, 29, and 30, and a formal warning on July 2. Noland received a final warning after missing work on Saturday, September 8 (GC Exh. 2(D)). That was his sixth unexcused absence within 6 months. As shown above, Respondent first learned of Noland's union activity during Noland's discussion with Derek Fletcher about his final warning. That discussion occurred shortly after Noland received his final warning on September 17, 2001.

The next incident regarding Noland's absentee record allegedly occurred on October 29. However, it was not until November 6 that Noland was called into a meeting with Putnam, Fletcher, and Lee Gill allegedly because he had left work early on October 29. I found that Derek Fletcher credibly testified that Noland said in that meeting that Fred Jones told him truck 4155 would not pull and that he could go home. Fletcher went on and testified that he talked with Fred Jones after the first November 6 meeting and, among other things, Jones said that he had told Noland that he could drive truck 4155 or go home.

That evidence shows that Bill Noland's argument was supported by Respondent's investigative findings regarding Noland leaving work early on October 29. Noland as well as Fred Jones recalled that Jones said that Noland could go home.

In view of that evidence, I shall question whether it was Respondent's practice to discharge or even discipline, employees under similar conditions. In that regard I have considered Respondent's treatment of Noland and other employees. As found below, Respondent showed itself to be lenient in the treatment of Noland (before discovering his union affiliation), Joe McDaniel, Mike Stubbs, and Scott Boyd.

As to Bill Noland, it was Respondent's announced practice[16] to discharge employees after 5 unexcused absences in a continuous 6-month period. Before Respondent learned of

[13] Fred Jones was the dispatcher that directed and supervised Noland on October 29. Respondent does not dispute that dispatchers had authority to permit employees to leave work.

[14] Noland testified about the October 29 incident. Dispatcher Fred Jones told Noland to take his truck to the shop for maintenance. Jones told Noland that the only truck available for replacement service was truck 4155. Noland testified that Jones also told him that truck 4155 would not pull and after he returned from taking his truck to the shop, he told Jones he did not want to drive 4155 and Jones gave him permission to go home. As shown above I credit Noland's testimony about his October 29 conversations with Fred Jones.

[15] Respondent's daily logs show that truck 4155 was out of operation for a short time on October 29 and for a longer time on October 30. In fact the truck broke down twice on October 30 (R. Exh. 3). Moreover, as shown in the record including testimony by Scott Boyd, truck 4155 was frequently not operational. It was frequently broken down and in the shop.

[16] See especially the testimony of Derek Fletcher.

Noland's union activities he had more than 5 unexcused absences during the 6 months starting on May 5, and was not discharged. Noland had unexcused absences on May 5, June 28, 29, and 30, July 2, and September 8, 2001. After Respondent first learned of Noland's union activity shortly after September 17, a situation arose that may not have involved disciplinary action before knowledge of Noland's union activities. Fred Jones testified that he normally did not count absences due to a driver not having an operational truck. Nevertheless after telling Noland that truck 4155 would not pull and that Noland could go home, Respondent decided to treat that incident as an absence and to discharge Noland.

Employee Joe McDaniel's[17] records were enclosed in Respondent's March 26, 2002 position statement (GC Exh. 3).[18] Joe McDaniel served as the Company observer during the September 2001 NLRB election. McDaniel's attendance log shows that McDaniel received a formal warning for unexcused absences on December 10, 2001. The attendance log shows that before McDaniel's December 10 formal warning, he had unexcused absences on September 8, October 18, and November 6, 2001. He received "FMLA" time off on September 27 and 28, 2001. After his formal warning McDaniel's attendance log showed unexcused absences on February 2, 16, and 23, 2002. As shown above Respondent's routine called for a final warning for the next unexcused absence following a formal warning and discharge on the next unexcused absence. In consideration of his September 8 unexcused absence, a continuing 6-month period started on that date and would have ended on March 8, 2002.

In regard to McDaniel's February 16 unexcused absence the hourly absentee report shows that McDaniel "left at 10 a.m. to go & fix his wife's car. Still had feed to haul—." McDaniel was absent on February 23, 2002, and no reason was given on the absentee report. McDaniel was not disciplined on either of those occasions even though under the rule applied to Bill Noland, McDaniel should have received a final warning on February 2, and been discharged following February 16, 2002. However, the record shows that McDaniel was not discharged even though he had an additional unexcused absence on February 23. Additionally, Respondent discovered a problem with McDaniel's absentee record when it updated its personnel records in February 2002, and it admitted in its March 26, 2002 position statement (GC Exh. 3), that it had to make adjustments or McDaniel would have been discharged.

Respondent argued that a comparison with Joe McDaniel is totally inappropriate. It argued that McDaniel should be treated differently because he qualified for absences under the family medical leave act. In that regard Respondent cited in its brief, a doctor's excuse dated August 20, 2000 (see GC Exh. 3). However, as shown in that alleged doctor's excuse, Dr. Madnani did not excuse McDaniel from Saturday work. Instead Dr. Madnani merely noted that McDaniel reported to him that he is not able to work 6 days a week and that McDaniel reported to him that he can rest his shoulder 2 days on weekends.[19] Moreover, Respondent admitted that it made no adjustments in the handling of McDaniel's absences at that time (i.e., August 2000). Instead Respondent argued that Derek Fletcher spoke with McDaniel's doctor and took steps to get the matter handled under the proper FMLA procedure. That matter had not been resolved when Derek Fletcher resigned in January 2002, and there was no showing that it was ever resolved in regard to the 6-month period following September 1, 2001.

Nevertheless, Respondent argued that it continued to treat McDaniel out of concern that it may engage in unlawful activity under the family medical leave act. It contended that McDaniel should not be compared with Noland in regard to missing Saturday work. It argued that it would be inappropriate to hold that it treated Bill Noland in a discriminatory fashion by finding unlawful its final warning to Noland for missing work on Saturday, September 8. As shown herein, I found that Respondent did not engage in unlawful action by issuing a final warning to Bill Noland for missing work on Saturday, September 8. Therefore, I did not inappropriately compare Noland with McDaniel in regard to Saturday work. Moreover, in considering McDaniel's overall absentee record, I relied on Respondent's own records, which were submitted to the NLRB Regional office with a letter dated March 26, 2001 (GC Exh. 3).

Mike Stubbs was shown to have received at least 12 unexcused, at least 25 excused, and 2 absences that did not count during 2001. Stubbs exceeded the number of absences both unexcused and excused, which Respondent alleged as prohibited during a continuing 6-month period and he was not discharged.

Some of Stubbs's records were included in Respondent's March 26, 2002 statement of position (GC Exh. 3). The attendance log shows that Stubbs received a formal warning for attendance violations on January 10, 2001. He then received a final warning on April 9, 2001, for unexcused absences from February 13 through February 19, and April 2, 2001. Even though Stubbs missed in excess of 6 workdays after his formal warning, he was not discharged. Beginning in July, after or near the end of the continuing 6 months for the period following his first unexcused absence in 2001 on January 6, Stubbs had unexcused absences on July 2 and 17, 2001, and was awarded a formal warning for a July 23, 2001 absence. An unexcused absence occurred on August 23, and Stubbs was awarded another final warning for an unexcused absence on September 3, 2001. Subsequently, but continuing in the 6 months beginning on July 2, 2001, Stubbs had a number of absences where call in sick was noted on the hourly absentee report. On some of those hourly absentee reports a doctor's note was attached showing that Stubbs qualified for excused

[17] McDaniel was also known as Carmen McDaniel.

[18] Other McDaniel records included R. Exh. 12.

[19] In that regard I have also considered a certification of health provider dated April 29, 2002, where a doctor comments, among other things, "Patient is currently incapacitated in regards that several hours of continuous work or several days of continuous work make his pain worse." (R. Exh. 12). That form was completed after the 6-month period that started on September 1, 2001, and ended on April 1, 2002.

absences.[20] However, an hourly absentee report dated 10-31-01 included the notation that Stubbs called in sick but "needs a doctor's note for 10-31-01," and the notation "7 combined occurrences (excused & unexcused) in 6-month period." If Respondent had applied its practice as explained by Derek Fletcher, Stubbs would have been discharged.

Respondent's treatment of Scott Boyd's application for hire, illustrated that Respondent was more lenient when the concerned employee did not support the Union. As shown above Scott Boyd phoned Respondent around October 19, 2001, and talked to Lee Gill. Boyd asked about returning to work for Respondent. At that time Boyd had four outstanding traffic tickets and 13 over a period of time on his CDL. He understood that Respondent had a rule prohibiting rehire for anyone with more than three traffic tickets. Boyd asked Gill if the traffic tickets meant that he would not get a job. Gill replied that the company was having trouble with the union and turmoil was going on. Boyd cut Gill off and said that he wasn't interested, that he wasn't part of that and that he just wanted a job. Gill told him to report Monday morning. That evidence shows that Respondent occasionally relaxed its rules especially when the employee involved did not support the Union.

There was more evidence that Respondent did not routinely discipline employees for leaving work after receiving permission from a dispatcher. Dispatcher Fred Jones admitted that he routinely did not count absences when drivers left early because of the unavailability of a truck.

In view of the above evidence I find that Respondent treated Bill Noland in a disparate manner and Respondent failed to prove that it would have discharged Bill Noland in the absence of his union activities.

I find that Noland's discharge was motivated by Respondent's antiunion animus, that Respondent engaged in pretext in an effort to prove its November 6 investigation of truck 4155 justified the discharge of Noland and Respondent failed to prove that it would have discharged Noland in the absence of his union activities.

CONCLUSIONS OF LAW

1. Sanderson Farms, Inc. (Production Division) is an employer engaged in commerce as defined in the Act.

2. United Food and Commercial Workers Union, Local 1529 is a labor organization as defined in the Act.

3. Respondent, by coercively interrogating its employee about the Union; by impliedly threatening its employee with negative consequence if he became involved with the Union and by threatening its employee that it was experiencing problems and would weed out troublemakers that support the Union; engaged in conduct in violation of Section 8(a)(1) of the Act.

4. Respondent, by discharging and refusing to reinstate its employee Bill Noland has engaged in conduct in violation of Section 8(a)(1) and (3) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employee Bill Noland, it must offer Noland immediate reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position and make him whole for all loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[21]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, it is hereby ordered that Respondent, Sanderson Farms, Inc. (Production Division), its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Coercively interrogating its employees as to whether the employee prefers the Union.

(b) Impliedly threatening its employee with negative consequence if its employee associates with the Union.

(c) Threatening its employee that it is experiencing problems and will weed out troublemakers that support the Union.

(d) Discharging and failing and refusing to reinstate its employees because of their association with United Food and Commercial Workers Union, Local 1529, or any other labor organization.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer reinstatement to Bill Noland to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges to which he would have been entitled if he had not been discharged.

(b) Make Bill Noland whole for all loss of earnings and other benefits suffered as a result of the discrimination against him, less any interim earning, plus interest.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause

[20] Derek Fletcher testified that it was Respondent's practice to charge an employee with an unexcused absence when the employee claimed illness but failed to provide a doctor's excuse.

[21] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of payment due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facilities in Fernwood, Mississippi, copies of the attached notice.[22] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 21 days after service by the Region, file with the Regional Director, Region 15, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 20, 2002

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate our employees about their union activity.

WE WILL NOT impliedly threaten our employees with negative consequence if they become involved with the Union.

WE WILL NOT threaten our employees that we are experiencing problems and will weed out troublemakers that support the Union.

WE WILL NOT discharge our employees because of their involvement with United Food and Commercial Workers Union, Local 1529, or any other labor organization.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL immediately reinstate Bill Noland to his former job or, if that job no longer exists, to a substantially equivalent job, and we will make Noland whole for all loss of earnings and other benefits suffered because of his unlawful discharge.

SANDERSON FARMS, INC. (PRODUCTION DIVISION)

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."